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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED*

1. Whether the "essential service" standard is a valid test which the I.C.C. may use to determine whether a railroad merger should be approved and/or conditioned under 49 U.S.C. 11343 (former section 5(2)).

2. Whether the I.C.C. should render findings concerning the probable "domino" effect of its merger approval in forcing other mergers insofar as the impact upon competition is involved.

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*Petitioners and intervening petitioners in the Court of Appeals were: Missouri-Kansas-Texas Railroad Company, Railway Labor Executives' Association, People of the State of Illinois, Illinois Commerce Commission, Patrick W. Simmons, M.S. Stuckey, Board of Trade of Kansas City, Missouri, Inc., Soo Line Railroad Company.

Respondents and intervening respondents in the Court of Appeals were: United States of America, Interstate Commerce Commission, Burlington Northern Inc., and St. Louis-San Francisco Railway Company.

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(*) Not reported. Ten copies have been lodged with Clerk of Court.

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Cross-petitioners, People of the State of Illinois, Illinois Commerce Commission, Patrick W. Simmons, and M.S. Stuckey, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered November 24, 1980.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported as *Missouri-Kansas-Texas R. Co.* v. *United States,* 632 F. 2d 392 (5th Cir. 1980).[1] The decision of the

[1]The opinion of the Court of Appeals is reproduced in the petition for writ of certiorari in No. 80-1434 at Al-A85.

Interstate Commerce Commission reviewed is reported as *Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 784 (1980).[2]

JURISDICTION

The judgment and opinion of the U.S. Court of Appeals for the Fifth Circuit were entered November 24, 1980.

This cross-petition for writ of certiorari is filed under Rule 19.5; the petition for writ of certiorari in No. 80-1434 was received February 27, 1981.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

The principal statutes involved are set forth in the petition of writ of certiorari in No. 80-1434, at pp.3-6.

STATEMENT

The proceeding involves judicial review of the decision of the Interstate Commerce Commission ("I.C.C.") approving merger of Burlington Northern Inc. ("BN") and St. Louis-San Francisco Railway Company ("Frisco").[3] There were three petitions for review in the U.S. Court of Appeals for the Fifth Circuit challenging the I.C.C.'s approval.[4] The court below affirmed the I.C.C.'s decision in

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[2]The I.C.C.'s decision is reproduced in the petition for writ of certiorari in No. 80-1434 at A86-A485.

[3]The authority of the Court of Appeals to review I.C.C. decisions is conferred by 28 U.S.C. 2341.

[4]The opinion of the Court of Appeals says the Illinois parties "intervened". This is correct, but when the I.C.C. questioned the Illinois parties broadening the issues raised by petitioner M-K-T, the Illinois parties then filed their own separate petition for review (No. 80-1692) so as to moot the issue. 632 F. 2d at 392 (No. 80-1434, Al).

a consolidated proceeding. 632 F. 2d 392 (No. 80-1434, A1-A85).

The Missouri-Kansas-Texas Railroad Company ("M-K-T") has petitioned for a writ of certiorari in No. 80-1434; Railway Labor Executives Association has petitioned for a writ of certiorari in No. 80-1439; this cross-petition for writ of certiorari is on behalf of the "Illinois parties". 632 F. 2d at 395 fn.2, 397 fn.6 (No. 80-1434, A4 fn. 2, A16, fn.6).

The I.C.C.'s approval of the merger was based upon the new concept of "essential services". The "essential services" standard was applied throughout the agency's decision, and is applicable to whether the merger would eliminate the essential services of BN and Frisco, or the essential services of M-K-T. The court below recognized that "essential services" is a more lenient standard than heretofore used to judge railroad mergers. 632 F. 2d at 401 (No. 80-1434, A32-A34):

> "This is a more lenient standard of merger approval because an application will no longer be denied or conditioned merely if it harms competitors, but only if it harms them to a degree that they cannot provide 'essential services'."
>
> "The Commission applied the new 'essential services' standard throughout its BN-Frisco opinion, consistently finding that the merged BN-Frisco would not eliminate any of its own essential services, 360 I.C.C. at 395, and that no competitor would be harmed to a degree that it could not provide essential service. id.

Neither the court below, nor the I.C.C., defined the term "essential services". The closest the agency came to a definition was expressed as those services required by the

national defense or necessary for other national goals. 360 I.C.C. at 933 (No. 80-1434, A236):

> "In this connection, our recent policy statement particularized numerous public interest criteria to be considered, as follows:
>
> (1) Whether *essential rail services* will continue to be provided, either by the consolidating companies or by other railroads which may be affected by the consolidation ('*essential services*' include, but are not limited to, those required by the national defense and those shown necessary to achieve other established national goals, such as energy conservation and rural and community development);"

Elsewhere the I.C.C. took the position that if a railroad should lose traffic owing to a merger of its competitors, it would simply mean that the service was no longer "essential":[5]

> "The merged company will provide strong competition to other railroads in all markets where they compete. These companies will be required to improve service or face a situation where certain service is no longer essential since it is being performed by the merged and other competitive companies". 360 I.C.C. at 939 (No. 80-1434, A242)
>
> "While a shift in traffic from one line to another may eliminate the need for service over the

[5]Subsequently, after the Court of Appeals sustained the merger decision, the I.C.C. revised its policy statement to define "essential service" as "A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available." *Railroad Consolidation Procedures,* 363 I.C.C. 784, 792 (1981).

> original line, this simply demonstrates that the earlier service is no longer essential." 360 I.C.C. at 951. (No. 80-1434, A254).

The BN-Frisco merger was approved by the I.C.C., and sustained by the court, because the merger was found not to threaten the essential services of BN, Frisco, or the protesting railroads.[6] The court found that the adoption of an "essential services" standard was simply a new weighing of the public interest under 49 U.S.C. 11344(b)(1)[7], and within the re-evaluation intended by the Congress that the Commission should undertake. 632 F. 2d at 403. (No. 80-1434, A40):

> "In order to gain that overall benefit for the public, the Commission has decided that only 'essential services' should be protected. We find that new weighing of the public interest perfectly appropriate under section 11343(b)(1) and any of the other broad statutory standards."

Other issues raised by the Illinois parties concerned the findings made by the I.C.C. concerning the anti-competitive effects of the merger. The court of appeals considered only one to be "substantial", i.e., the cumulative impact of the BN-Frisco merger to encourage other railroad mergers. The court ruled that the agency need not at this time consider the "domino" effect of merger approval upon the necessity for other mergers, and that future mergers occasioned by the BN-Frisco merger would be evaluated on their own merits. 632 F. 2d at 410. (No. 80-1434, A72-A73).

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[6]632 F. 2d at 401. (No. 80-1434, A33-A34).

[7]The statutory terms are set forth in No. 80-1434, 4-6.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

I. THE ISSUE OF THE "ESSENTIAL SERVICES" STANDARD IS OF PUBLIC IMPORTANCE IN VIEW OF THE MANY PENDING MERGER PROPOSALS.

The agency and court decisions below represent the first use of the "essential services" standard—a new policy developed by the I.C.C. for railroad consolidations. Pending at the I.C.C. are major railroad merger proposals. These include F.D. No. 29430, where Norfolk & Western Railway Company seeks to merge with Southern Railway Company; and F.D. No. 30,000, where Union Pacific Railroad Company seeks to acquire Missouri Pacific Railroad Company and Western Pacific Railroad Company. The agency has recently approved joint control of the Chessie and Seaboard Coast Line systems in F.D. No. 28905, *CSX Corp.-Control-Chessie and Seaboard C.L.I.*, 363 I.C.C. 518 (1980), but the approval is pending petitions for reconsideration, etc.[8] Other merger proposals are believed to be in the offing. It is desirable that there be an early determination as to the validity of the "essential services" standard.

The "essential services" standard is more than determining whether smaller railroads should be protected.[9]

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[8] Judicial review is in abeyance pending further agency decision. No. 80-2534, *People of the State of Illinois* v. *I.C.C.* (7th Cir.).

[9] See: No. 80-1434, Question No. 2, pp. ii-iii. We disagree with M-K-T, and take a more expansive interpretation of the "essential services" standard.

II. THE "ESSENTIAL SERVICES" STANDARD IS AN INVALID STANDARD FOR RAILROAD CONSOLIDATION UNDER SECTION 5(2), NOW 49 U.S.C. 11343.

The court of appeals erred in finding the "essential services" standard – concededly a more lenient test – as permissible within the statutory guidelines governing I.C.C. approval of railroad mergers. Congress in the so-called 4-R Act[10] did not change the substantive standards governing merger approvals under the former section 5(2), and under which the BN-Frisco merger was approved.[11] But Congress in the 4-R Act did enact an alternative merger process by a new section 5(3), which placed initial review and planning in the hands of the U.S. Secretary of Transportation.

The new section 5(3)[12] provides that after review by the U.S. Secretary of Transportation the merger would be heard before a panel of the I.C.C. and determined on an expedited basis. The I.C.C. would approve the merger if "in the public interest", and would not have to consider the specific factors enumerated in section 5(2).[13] 632 F. 2d at 401 fn.24. (No. 80-1343, A35).

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[10]P.L. 94-210; Railroad Revitalization and Regulatory Reform Act of 1976. (Feb. 5, 1976). 90 Stat. 31.

[11]Certain decisional time restraints were imposed. P.L. 94-210, section 402.

[12]The provisions of section 5(2) and section 5(3) have been recodified by P.L. 95-473 (Oct. 17, 1978). Section 5(2) is now contained in 49 U.S.C. 11343-45, 11347; section 5(3) is now 49 U.S.C. 11346. Staggers Rail Act of 1980 (P.L. 96-448, Oct. 14, 1980) made certain changes, but are not material here. 632 F. 2d at 400 fn.19. (No. 80-1434, A30).

[13]These are: (1) adequacy of service, (2) effect of including other rail carriers, (3) total fixed charge, and (4) interest of employees. See: No. 80-1434, 5.

The "essential services" standard was developed by the I.C.C.'s Rail Services Planning Office ("RPSO"). RSPO stated that the new section 5(3) "emphazised" the "essential services". 632 F. 2d at 402 fn. 25 (No. 80-1343, A36-A37). RSPO urged that the "essential services" standard for section 5(3) be applied to section 5(2) as well:

> "Acquisition by stronger railroads has been advocated as the method for assuring the survival of marginal carriers. The 4R Act takes a different approach, authorizing in Section 5(3) of the IC Act an expedited merger procedure which emphasizes the preservation of essential service rather than of marginal carriers." (RSPO Final Report, p. 38)
>
> "The Office urges the Commission to adopt as a primary policy the preservation of essential service rather than corporate entities in the restructuring process and to apply this policy in Section 5(2) as well as Section 5(3) proceedings. "(RSPO Final Report, p. 39).

The court of appeals erred in rejecting the contentions of the Illinois parties that the I.C.C. has lifted the more lenient "essential services" standard from section 5(3) and made it applicable to section 5(2) proceedings. The court of appeals stated that the "public interest" standard is the same for both section 5(2) and section 5(3), and there is no legislative history or statutory basis whatsoever to support a difference. The court added that section 5(3) is lenient only in that it expedites merger proceedings and relieves the I.C.C. of the duty to consider the four factors otherwise required by section 5(2).[14] 632 F. 2d at 402 and fn. 25,26. (No. 80-1434, A35-A37).

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[14]Ibid.

Contrary to the opinion of the court below, there is strong statutory language and legislative history showing that Congress intended different standards for merger proposals processed under section 5(3) than for section 5(2). First, there is the statutory language itself, where the four criteria of section 5(2) are deleted in section 5(3). Second, there is the difference in language between section 5(2)'s "consistent with the public interest", and section 5(3)'s "in the public interest". Finally, the Conference Report made it clear that a merger would be subject to a different standard of review if filed under section 5(3) instead of under section 5(2). H. Rept. 94-781, *Conference Report on S. 2718,* 174 (1976):

> "The most significant features of both bills are that the Secretary of Transportation is given a significant role as a catalyst in the studying, developing, and negotiating of railroad mergers. Further, the Secretary is authorized and, under the new 'expedited merger proceedings' is directed to appear before the Commission with the result of his studies.
>
> "Second, alternative merger procedures, with different standards for review by the Commission, are made available to railroads attempting to merge.

The same Conference Report added, at p. 175:

> "The adopted House provisions entitled 'Expedited Merger Railroad Merger Procedure' offers to railroads an alternative procedure for seeking approval of a merger that differs in significant functional aspects from section 5(2) of the Interstate Commerce Act in that (1) initial planning or review process is undertaken by the Secretary rather than in a hearing before the

> Commission (however, after the plans are finalized, they are submitted to the Commission for its approval), (2) it establishes public interest as the standard for the Commission's approval of a merger rather than the standard established under sectio 5(2) of the Interstate Commerce Act . .. ."

Another statutory difference between section 5(2) and section 5(3) is that petitions for inclusion are impermissible under section 5(3). *Railroad Consolidation Procedures,* 359 I.C.C. 195, 197 (1978).

The result of the I.C.C.'s adoption of the "essential services" standard is that the railroad industry has no incentive to go to the U.S. Secretary of Transportation with merger proposals, for the I.C.C. has relaxed its traditional standards. Yet the public does not have the benefit of the planning and expert panel contemplated by the section 5(3) procedure. As a result, section 5(3) has never been invoked by anyone, and stands dormant. The I.C,C. has won the battle against the Department of Transportation, but at the price to the public of the "lenient" standard of "essential services".

The court of appeals erred in giving its approval to such an arrangement.

III. THE ANALYSIS OF THE ANTI-COMPETITIVE CONSECUENCES OF THE MERGER IS INADEQUATE.

The I.C.C.'s staff acknowledged that approval of the BN-Frisco merger may well prompt other rail mergers. (RSPO Final Report, i):

> "Recently, the Burlington Northern and the Frisco have requested the Commission to

> authorize their merger application. This proposed consolidation would, if approved, create a rail system with the largest number of route miles in the Nation and may well prompt other major carriers to develop their own rail consolidation proposals.

The I.C.C. noted in its approval of the merger that such a domino effect is not necessarily contrary to the public interest. 360 I.C.C. at 939 (No. 80-1434, A242):

> "A domino type effect from a merger of this sort is not necessarily contrary to the public interest. Indeed, where rail carriers are forced to look to rationalization, operating efficiencies, service through some form of consolidation or restructuring to continue essential services, the public interest can only benefit."

The court of appeals erred in sustaining such an explanation of anti-competitive consequences for the BN-Frisco merger. 632 F. 2d at 410. (No. 80-1434, A72-73. Some agency findings are necessary on the cumulative impact, and the agency cannot prejudge future mergers. The I.C.C. must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation. It has not done so here. *McLean Trucking Co. v. United States,* 321 U.S. 67, 87 (1944); *Minneapolis & St. L.* v. *United States,* 361 U.S. 173 (1959); *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154 (1965).

The "domino" effect of a merger is precisely the consideration which will require deferral of a merger until the fate of other railroads may be made known. *B. & O.R. Co.* v. *United States,* 386 U.S. 372 (1967).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals in this case.

Respectfully submitted,

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